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SUPREME COURT, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JACK FERRANTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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87 pp

QUESTIONS PRESENTED

Petitioner was convicted of arson in which a firefighter died. The first-floor store that Petitioner rented and used for a women's boutique did not purchase or sell anything outside of the state. The landlord rented the upper floors to residential tenants. The Court of Appeals upheld the conviction under 18 USC §844(i) (arson of property in or in an activity affecting interstate commerce) based on this Court's "pre-Lopez" decision, United States v. Russell, 471 U.S. 858 (1985), which held federal jurisdiction was *per se* established because "the rental of real estate" is "unquestionably" an "activity" that "affects commerce". The questions presented are:

1. Whether Russell, which did not consider the "substantiality" requirement established in United States v. Lopez, 514 U.S. 549 (1995), survives Lopez and permits a federal conviction of a local arson--an activity not inherently commercial--on the basis that the landlord used the subject property as rental property, when such conclusion is also at odds with the post-Lopez decision in United States v. Robertson, 514 U.S. 669 (1995), in which the fact that an "enterprise" was "in business" did not suffice for "interstate commerce" but required evidence of interstate transactions.

2. Whether and to what extent Lopez' rationale "applies" (requiring a "substantiality" analysis) where, unlike the statute in Lopez, a statute, though not regulating a commercial activity, has a jurisdictional limitation, such as the arson statute at issue--an issue that has yielded conflicting approaches in the Second Circuit on the one hand and the Ninth

and Eleventh on the other.

Petitioner's sentence was derived from application of the first-degree murder Guideline pursuant to an arson Guideline cross-reference-directive to use the "most analogous" homicide Guideline when "death results" if it is higher than the arson Guideline. The questions are:

3. Whether it is proper to use the first-degree murder Guideline where death results in an arson or whether, given ambiguity in the Guidelines, the rule of lenity requires use of at worst the second-degree murder Guideline and/or a "departure" on the basis that the death of a firefighter was not "knowing and intentional", as almost all other circuits considering similar (or worse) circumstances have approved.

4. Whether use of the first-degree murder Guideline is proper in an arson case merely because a *different* statute, 18 USC §1111 (murder in a federal enclave) points to that Guideline, given this Court's acknowledgment in Lewis v. United States, No. 96-7151, 1998 U.S. LEXIS 1604, *21 (March 9, 1998), that the federal murder statute is "applicable only on federal enclaves" and this was not a murder case nor was committed in a federal enclave.

5. Whether a sentencing "departure" from the first- to the second degree murder level, as invited by the homicide Guideline, can properly be deemed a matter of "discretion" when the result is driven by a *legal* conclusions concerning whether the unintended death of a firefighter (or others) resulting from an arson is "knowing and intentional", and

where, because no other court has held that such a death is "knowing and intentional", the refusal to "depart" appears a without a discernibly principled basis.

6. Whether, where a defendant is sentenced to a term of years not defined by his natural life, a court can deny him the benefit of good-time credits, which Congress held "shall" be credited, 18 USC §3624(b)(1), as the Second Circuit held here in conformity with the Fourth Circuit's decision, or whether, as the Seventh Circuit has held, a sentencing court cannot properly deny a defendant the benefit of the good-time-credit system established by statute and meant to encourage good institutional behavior.

Petitioner's connection to the arson was established by testimony concerning an alleged statement made by an alleged co-conspirator to his drug-supplier after the fire. The evidentiary questions are:

7. Whether Federal Rule of Evidence 803(2)--allowing a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"-- and/or White v. Illinois, 502 U.S. 346, 356 (1992), which deemed sufficiently trustworthy a statement made in "a moment of excitement, without the opportunity to reflect on the consequences of one's exclamation"--and/or the Confrontation Clause, should preclude a statement made hours after the event, where the declarant had "reflected" sufficiently to drive to the witness's house to obtain cocaine, where the hearer-witness testified that

he had not believed declarant, and where the declarant would not in any event have been "excited" by the event had he been the one to set the fire--and, indeed, where the Court could not even identify the fire as a "startling event" with certainty.

8. Whether Federal Rule of Evidence 602 is satisfied by a showing of "personal knowledge" premised on conjecture.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America, and Defendants-Appellants Mario Ferranti and Thomas Tocco, as well as Petitioners Jack Ferranti.

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Arson Sentencing Guideline, USSG § 2K1.4 a41

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No.

JACK FERRANTI,

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals' decision affirming the conviction is reported at 39 F.3d 42 and is reprinted in App. at a1-a36.

JURISDICTION

The decision was entered on January 13, 1998 and judgment was filed on January 16, 1998. Jurisdiction is invoked under 28 USC §§1254(1) and 2101(c).

PERTINENT STATUTORY PROVISIONS

The pertinent portion of the arson statute, 18 USC §844(i), is reprinted at a37; the arson Guideline, §2K1.4, is reprinted at a41: the first- and second-degree murder Guidelines, §§2A1.1 - 2A1.2, are reprinted at a38-40.

STATEMENT OF THE CASE

Following a jury trial, petitioner was convicted of arson under 18 USC §844(i), arson conspiracy (§371), mail fraud (§1341), and witness tampering (§1512). He was sentenced to 435 months. The Second Circuit affirmed (a1-a37).

1. On a February night in 1992, firefighters were called to a three-story walk-up building in Queens, New York, the upper floors of which were rented to residential tenants and the ground floor of which was leased to petitioner for his use as a women's "boutique"; the evidence showed it did little business--on some days none at all. Two firemen proceeded to the second floor. Enveloped in smoke and trapped inside, one smashed the front window and managed to safely lower himself from the window ledge to the ground; tragically, Lt. Williams, having received no response to his "May Day" call, fell to his death from the second story window. All the residential tenants escaped the smoky building.

Two of them, a transit bureau policeman and his wife, testified about a 3-5 second encounter with a man outside the building who had asked whether there were people left inside. The police officer, who assured the jury that as a policeman he had special skills at identification, later identified a photo of co-defendant Thomas Tocco, whose out-of-court statement to his drug supplier would later be admitted, as that man. Neither tenant, however, recalled anything "distinctive" about Tocco's voice, though the government's cooperating witness said that that voice was distinctively "strange" and "raspy".

Fire investigators testified that they saw two circular

burn patterns on the floor near the dressing room of the store area--evidence of flammable liquid, they said. The police conducted no tests of the flooring for confirmation of the investigators' opinions; the defense *could not* perform any tests because the police had destroyed the wood flooring before trial. A defense expert witness testified that if there had been flammable liquid, the paneling around the dressing rooms would have rapidly burned, simultaneously igniting combustibles in that space and extending forward, breaking the glass window -- a scenario that did not happen.

Investigators also took a portable heater recovered, they said, from between the two burn patterns. According to an agent from the FBI lab, the heater had not malfunctioned nor was "energized" at the time of the incident. A defense expert who later examined the heater at the FBI lab, however, testified that he had seen (and took photos of) "beading"; however he returned two weeks later and found the material "changed".

Petitioner filed an insurance claim. When his claim was challenged, he was examined under oath; counsel also sent requests and notices by mail. Petitioner was shown to have made statements admitting that he had not been forthcoming at first about where he had been during the fire, and he ended up withdrawing his insurance claim.

More than three years after the fire, police detectives, having had no success indicting Petitioner or his brother (despite a lengthy neighborhood investigation), found out that Vincent Marziano, a drug abuser and convicted felon from the neighborhood, had again been arrested--this time with his

girlfriend-- and was awaiting arraignment. Marziano, thinking that he "might be able to work out some ... deal", immediately cooperated after a detective said they wanted his help concerning Tocco and Mario Ferranti burning a building for (petitioner) Jack Ferranti, Marziano told the police (and then testified) that Tocco had banged on his window in the early morning hours on an unspecified date, and said that he had just "lit" a building with Mario, and that they had done it "for Jack". Tocco then ingested cocaine that Marziano gave him.

Even though Marziano had not believed Tocco, when Marziano ran into Mario at a neighborhood bar, he told him that Tocco had been talking about the fire. Mario had said nothing but supposedly nodded and walked away. Though the district judge at first ruled the "nod" too ambiguous to be used, he reversed himself and allowed it.

2. At trial the government's efforts to prove interstate commerce focused on three items: First, a store employee said that the store had carried "L.A. Gear" clothing. Though there was no proof where any such clothing was manufactured or from where it was purchased, the government argued that L.A Gear "was interstate commerce". Next, investigators had found one $54.13 American Express credit card slip at the store and an American Express witness said that that company processes accounts "like Today's Styles" through a processing center in Florida. There was no evidence that this account was actually processed in Florida. Finally, the store's insurance was financed by a company in New Jersey--a factor which even before Lopez had been found insufficient to confer federal

jurisdiction under the arson statute.[1] There was no evidence that any sales were made out of State, nor that anything (other than insurance) was purchased from out of State.

3. Writing a decision on a post-trial Rule 29 motion, District Judge Weinstein sustained the verdict on the basis of "facts" he seemingly "noticed" (and held that jurors had also appreciated) (Second Cir. App.385-87):

> The typical retail dress shop involved here is the end point of a complicated interstate and international web of garment production and sale. Cotton is supplied by southern states, California and Egypt. Wool comes from the Far West and the Antipodes. ...Sewing is performed in New York, Lost Angeles, Latin America and the western rim of the Pacific. Designs originate in Paris, New York and Japan .... Gas and oil for heating and electricity is shipped from the American South West and the oil producing nations of the Middle East. The fire insurance was financed in New Jersey. Credit sales were approved by American Express in Florida.

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[1] See e.g., United States v. Barton, 647 F.2d 224, 232-33 & n.8 (2d Cir. 1981), expressing doubt that merely dealing with an out-of-state insurance company would be sufficient to supply an "interstate commerce" nexus. Accord, United States v. Mennuti, 487 F. Supp. 539 (E.D.N.Y. 1980) (though motive for destroying building "was to fraudulently procure insurance proceeds from an out-of-state insurance company", statute did not "regulate" insurance, and so jurisdiction could not be met by showing an effect on insurance.)

> [T]hese facts were known to the sophisticated jurors who live and work in or near New York City... A reasonable jury had sufficient basis to find that the store's and building's activities substantially affected interstate or foreign commerce. The commercial activity at the store ... falls within the interstate business category....This type of business activity establishes a sufficient nexus to satisfy... Lopez.
>
> [T]he building fell within the class of multiple dwelling apartment buildings that is... part "of a much broader commercial market in rental properties" affecting interstate commerce .... Russell, 471 U.S. at 862.
>
> Defendant sought to defraud a New Jersey insurance company.He affected interstate commerce by setting fire to a rental unit that served interstate commercial and residential purposes. His garment shop was connected to the world. ....

4. Petitioner was sentenced principally to a term of 435 months.[2] The court arrived at this sentence pursuant to a "cross reference" in the applicable arson Guideline, §2K1.4(c) (a41), which directs a court to use the "most analogous guideline"

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[2]He was also ordered to pay restitution in the amount of $1,455,799.79, and fine of twice the restitution, or $2,911,599.58 (under the alternative fine provision of 18 USC §3571(d).

among the 2A (homicide) guidelines "[i]f death resulted, or the offense was intended to cause death or serious bodily injury", but only "if the resulting offense level is greater than that determined" under the arson guideline The court then selected Guideline §2A1.1 (a38), which yields a level 43 (life sentence) for first-degree murder, because it is the Guideline used for 18 USC §1111, murder on a federal enclave, which classifies death resulting from arson as first-degree felony murder. Agreeing that under former 18 USC §34, a "straight life sentence without parole"could not be imposed because there had been no decision by a jury that a life sentence was appropriate, Judge Weinstein crafted a sentence as closely approaching life without parole as possible: he computed the defendant's life expectancy in months, subtracted a few months to purportedly comply with §34, calculated the months that defendant "would receive" as good time credits under 18 USC §3624(b) if he served that sentence, and then added those months back, resulting in a sentence of 435 months (36.25 years)--*more* than Petitioner's actual life expectancy.

5. While finding Petitioner's first-impression legal challenges "skillfully articulated", the Court upheld the arson conviction solely on the *per se* rule of United States v. Russell, 471 U.S. 878 (1985), which held that "real estate" is "in commerce" and so, if present in an arson case, establishes the required jurisdictional showing. The Court also held that in that the arson statute had its own jurisdictional element, and that Lopez' substantiality analysis was not applicable.

The Court also upheld the sentence, rejecting the

challenge that ambiguity in the Guidelines (the first-degree murder Guideline would always yield a higher level than the arson statute) warranted at least the second-degree murder Guideline under the rule of lenity.

The Court approved use of the Marziano testimony about Tocco's alleged statement (we lit the fire, for Jack) as an "excited utterance" (Federal Rule of Evidence 803(2)). The Court did not state that the fire was a "startling event", but rather that it "*may*" [emphasis added] be. "[E]ven if it did not", the Court posited, Tocco's "subsequent realization that people could be trapped inside the burning building, which he had helped set, would comprise a startling event".

The Court also held that personal knowledge, required by Federal Rule of Evidence 602, concerning the "for Jack" portion of the statement, was sufficiently shown. The Court held that testimony about Tocco's statement satisfied a hearsay exception, and thus the Confrontation Clause (a22-a23).

REASONS FOR GRANTING THE WRIT

I. Since The Lower Courts Are Bound By *Russell* Unless Overturned by This Court, This Court Should Grant The Writ To Settle Whether *Russell*, Which Without Analysis And Under The Seemingly Discredited "*De Minimis*" Standard Adopted A *Per Se* Rule That Real Estate "Affects Commerce" Within The Meaning Of The Arson Statute--Survives *Lopez*, Which Held That Federal Jurisdiction Cannot Be Exercised Without A *Substantial* Effect On Interstate Commerce.

In what appears to be a watershed decision in United States v. Lopez, 514 U.S. 549 (1995), this Court held that the

enactment of a federal statute that prohibited the possession of a firearm in a "school zone" exceeded Congress's authority under the Commerce Clause because the statute sought to regulate local activity and it could not be said that the activity sought to be regulated "affected interstate commerce" in the "substantial" way that, the Court held, the Constitution requires. Although Lopez dealt with the constitutionality of the statute, its principles should be applicable to determinations as to whether sufficient evidence satisfied a jurisdictional "peg" meant to assure that this "substantiality" requirement is satisfied, to avoid "obliterat[ing] the distinction between what is national and what is local" such as would "create a completely centralized government". Lopez, 115 S.Ct. at 1628-29. Indeed, this Court's own post-Lopez *per curiam* decision in United States v. Robertson, 514 U.S. 669 (1995) shows that the Court reviewed the record to assure sufficient evidence that the alleged RICO enterprise either was engaged in, or substantially affected, interstate commerce.

Since Lopez was announced, there have been numerous challenges to arson convictions under §844(i) in the lower courts. Based on Lopez' "substantiality" requirement, some courts have rejected arguments that private residences are within the statute based on indicia of "commerce" such as the provision of natural gas, e.g., United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), though cases prior to Lopez yielded decisions that §844(i) reaches private residences. E.g., United States v. Stillwell, 900 F.2d 1104, 1107-08 (7th Cir.)(de minimis contact sufficient), *cert. denied*, 498 U.S. 838 (1990).

Here, the government *attempted* to prove a nexus to interstate commerce through a showing that the store, supposedly, had interstate contacts. That showing was so weak that the district court's Rule 29 decision did not sustain the verdict on the showing the government made (one American Express slip, an out-of-state insurance broker, and the fact that the store carried "L.A.Gear", though its origin was not proven at trial). Rather, in words reminiscent of the government's argument rejected in Lopez (see 115 S.Ct. at 1632), the trial court held (as quoted at pp.5-6 *supra*) that the "sophisticated jurors" could have discerned that "the store's and building's activities substantially affected interstate... commerce" because the shop was "connected to the world", in interstate commerce.

In response to Petitioner's appellate argument that the district court had "invented" a showing not made at trial, the government argued that, merely because the landlord used the property as rental property, it "per se" affected commerce and that the decision could thus be sustained solely under United States v. Russell, 471 U.S. 858 (1985).

Though the government had asked the Russell Court to rule on whether commerce was sufficient shown in that the apartment building was heated by gas and insurance fraud was involved, the Court did not go past the fact that the building was used as rental property. Reviewing the legislative history of §844(i), the Court noted Congress' intention to reach "business" property and held, with little further analysis, that because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental

properties", the "rental of real estate is unquestionably" an activity that affects commerce, the jurisdictional element of the arson statute was satisfied.

Lopez, we suggest, casts significant doubt on Russell's continuing viability. In the first place, Russell decided at most that the rental of activity "affects commerce"--not that it substantially affects commerce. Indeed, Russell was decided when the *de minimis* standard of "connection" to interstate commerce was still *de rigeur*, when this Court was accepting virtually any explanation to sustain an Act under the Commerce Clause, and when there was no analysis of just how the "regulation" related to some problem in interstate commerce which the statute was designed to "regulate".

In the second place (with all due respect to the Russell Court), *Congress* did not make the "findings" on which Russell relied. Indeed, there was no evidentiary basis for a finding that local rentals affect interstate commerce, much less "substantially" so. The conclusion is based on *ipse dixit.*

Third, regardless of whether Congress could regulate the rental of real estate of a purely local nature by, for example, requiring reports of vacancies; regardless of whether Congress could regulate "rental property" that advertises out-of-State; and regardless of whether Congress could regulate arson for profit--the arson statute as written does not purport to regulate "real estate". Since the statute at issue, like the one in Lopez, purports to regulate an activity (arson) not inherently "commercial", there can be no valid argument that federal prosecution of such arson is "an essential part of a larger

regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated", 115 S.Ct. at 1631. Surely a showing of a "substantial connection" between the regulation and interstate commerce requires more than a showing that property was used by someone in a purely local real estate business.

At least two circuits have expressed the view that Russell's "real estate" *per se* ruling appears in conflict with Lopez, but have accepted it as binding. See United States v. Gomez, 87 F.3d 1093, 1097 (9th Cir. 1996)[3], and United States v. Martin, 63 F.3d 1422, 1427-28 & n.2 (7th Cir. 1995).[4]

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[3]Gomez affirmed the conviction, as here, only on Russell's strength, but observed that there was significant "appeal" to the argument that the "act of damaging an apartment building that, practically speaking, probably has little to do with interstate commerce should not be a federal case".

[4] The Martin Court noted:

> One might question if some [prior arson/commerce] interpretations can go too far. .... The Supreme Court's recent decision in ... Lopez ... also suggests that the winds of interstate commerce jurisprudence may have shifted, albeit slightly, against these expansive understandings of what it means for a building to be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."
>
> [T]he statutory sufficiency of interstate utilities, ownership, building materials, or insurance does not touch the facts of the instant case, in which we have a rental property still available for rent but otherwise closed to interstate commerce. This rental is the interstate hook on which the government

(continued...)

Simply put, it is time--and is necessary--to reexamine Russell. It is necessary because Lopez makes clear that Russell's conclusion--that an "activity" "affects interstate commerce"--does not answer the Constitutional question and it is leading courts in a direction of sustaining federal cases where interstate contacts are trivial (as further noted in the footnote).[5] Courts must now decide whether a particular showing in fact is proper under Congress' authority to regulate of interstate commerce. If the statute involves regulation of an intrastate activity, as Lopez categorized the activity regulated in Wickard v. Filburn and here, then where there is only a trivial nexus with commerce, jurisdiction can be sustained only

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[4](...continued)
hung its argument and which appeared in the jury instructions.

Then in its footnote 2 the court adhered to Russell: " That may be a slender thread on which to hang an interstate commerce connection, but under Russell ...it is enough. "

[5]Courts have sustained arson convictions under Russell where property used as "rental property" is closed, vacant, or otherwise not on the market. E.g., United States v. Martin, 63 F.3d 1422, 1427 (7th Cir. 1995)("property routinely used in interstate-commerce activity does not lose its interstate use because of temporary cessation of that activity"); United States v. Ryan, 41 F.3d 361, 364 (8th Cir. 1994)(en banc) (§844(i) satisfied "even when the property is temporarily closed or vacant"), cert. denied, 115 S.Ct. 1793 (1995); United States v. Turner, 995 F.2d 1357, 1362 (6th Cir. 1993) ("property routinely used in interstate commerce activity does not lose its interstate characteristics because of a temporary cessation of that activity"). But see United States v. Gaydos, 108 F.3d 505 (3d Cir. 1997) (owner intended to and did take dilapidated house off market before burning it; no longer used in activity affecting commerce).

if the statute is shown to be "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated" (115 S.Ct. at 1631). Because under Lopez, the inquiry can no longer end upon a conclusion that an activity "affects commerce"--virtually all human activities in our complex society have at least some trivial effect--Russell should be overturned as answering the wrong question.

Instead of considering the things that Lopez says must be considered, Russell focused on the notion that Congress *intended* to protect "business property" and that, because "rental property" is "business property", the arson statute covers any building used as a rental, regardless of the fact that it is local in nature. Significantly, Congressional findings underlying passage of the arson statute (cited in Russell and noted below[6]) show that, despite its "intent" to broadly legislate, Congress understood that it was limited to "business property" "where the business is interstate commerce". In any event, the fact that Congress may have intended to cover all "business property" and that "rental property" is "business" is no longer a sufficient answer.

Were it sufficient, the Court in Lopez could have sustained the gun statute on the basis of prior decisions that

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[6]The legislative debate cited at footnote 6 of the Russell opinion shows Congressman Wilson making clear that the statute was "designed" to cover "the business office", with the express proviso that that would be "where the business is interstate [emphasis added] commerce, giving the Federal Government a basis for jurisdiction."

schools are an "enterprise" that "affects commerce". So ruled Maryland v. Wirtz, 392 U.S. 183 (1968), upholding a Commerce Clause "regulation" of wages and hours of school employees because schools were deemed an "enterprise" under the Fair Labor Standards Act. Despite this, the Lopez Court went far beyond the facile suggestion that the mere characterization of an object of regulation is a "business" is enough to sustain federal jurisdiction. Merely because economic regulation is or may be sustainable even if the "effect" on interstate commerce of the individual intrastate incidents of the activity are remote, that does not mean--after Lopez--that non-economic "regulation"--here, of arson--can be sustained merely by saying that it affects something broadly "in the flow" of commerce. The fact that a local rental property reflects a "business" no more turns a local arson of a local business into a federal crime than the possession of a gun becomes of federal concern merely because the gun is carried near (and can affect) a school. Put another way, while Mr. Filburn may be prosecuted for growing wheat on his own property, Congress could not federalize an arson committed on his wheatfield just because of that circumstance.

The post-Lopez decision in United States v. Robertson, 514 U.S. 669 (1995) also suggests that the appellation "business" is not enough to justify a federal criminal conviction. In Robertson, the Court sustained RICO jurisdiction but only after finding that the particular enterprise was itself engaged in interstate "business" (by showing interstate transactions). Citing United States v. American

Building Maintenance Industries, 422 U.S. 271, 285 (1975), the Robertson Court seemingly endorsed the notion (reached in American Building under the Clayton Act) that mere local purchases, even of equipment and supplies "merely manufactured out of state", was insufficient to show interstate commerce. If the Russell notion that *all* "business property" was a matter of federal concern because it is "unquestionably" within the flow of interstate commerce, then Robertson would not have had to go past the appellation "business".

Though decided under a *de minimis* standard, Russell is binding precedent. Because the inquiry has changed, and because Russell is being used to approve federal jurisdiction over local matters, Russell should be overruled, lest an arson of the local lemonade stand be prosecuted in federal court because--to use the district court's words-- the business is "connected to the world".

II. The Court Should Grant The Writ To Resolve A Conflict Between The Circuits Concerning Whether *Lopez* "Applies" When A Statute *Does* Have A Jurisdictional Element

In rejecting the suggestion that Lopez had implicitly overruled Russell, the Second Circuit held that, because the arson statute contained a jurisdictional element, Lopez was distinguishable, and that Lopez "did not elevate the government's burden in proving a nexus to interstate commerce" (a10-11). The Court cited its own prior cases to that effect: United States v. Farrish, 122 F.3d 146, 149 (2d Cir. 1997) (*Lopez* did not suggest that the Court intended to

heighten the threshold for establishing jurisdiction under such statutes."); United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir.) (*Lopez* did not raise the government's burden under the federal money laundering statute, which contains a jurisdictional element requiring the financial transaction to affect interstate or foreign commerce "in any way or degree"), *cert. denied*, 117 S. Ct. 1713 (1997); United States v. Flaherty, 76 F.3d 967, 974 (8th Cir. 1996) ("Lopez... did not address the amount of evidence required to prove an explicit jurisdictional element of an offense and does not control this case.").

In this approach, the Court of Appeals' decision conflicts with the decision in United States v. Pappadopoulos, 64 F.3d 522 (9th Cir.1995), which rejected the argument that under Wickard v. Filburn, 317 U.S. 111 (1942), a conviction for arson of a private residence that received out-of state gas could be sustained even if the effect on commerce was "trivial". Lopez, the Court recognized, had "ma[de] it clear that the *Wickard* line of cases `may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' *Lopez,* 115 S. Ct. at 1628-29, *quoting* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37...."

So, too, United States v. Denali, 73 F.3d 328 (11th Cir. 1996), accepted the notion that even where a statute *does* have a "jurisdictional element", Lopez requires a determination of the substantiality of the interstate commerce nexus to assure

that our federal system prevails.

The Second Circuit's approach (aside from relying on Russell) cannot be squared with these other circuits' rationales or, as those courts realized, with Lopez, which reiterated that it is "only that where a general regulatory statute bears a substantial relation to commerce" that the *de minimis* character of individual instances arising under that statute is of no consequence." This Court should grant the writ to resolve the conflict between the Second Circuit, and the Ninth and Eleventh Circuits, as to whether the Lopez "substantiality" standard should apply in determining whether evidence satisfies the jurisdictional "peg" present in a statute.

III. The Court Should Decide Which Sentencing Guideline Applies In An Arson Case Where Death Results--A Matter Of Uncertainty And Inconsistency In The Lower Courts--In Order To Obviate Such Inconsistency, Resolve Apparent Ambiguity In The Guidelines, And Create Uniformity By Obviating Whimsical "Departure" Decisions Under USSG §2A1.1 .

The Court of Appeals affirmed use of USSG §2A1.1, the first-degree murder Guideline, because Lt. Williams died. Section 2A1.1 (quoted at a38-39), which yields a life sentence regardless of Criminal History, was selected pursuant to a "cross reference" in the applicable arson Guideline, USSG § 2K1.4(c)(quoted at a41), which directs courts to use the "most analogous guideline" among the 2A (homicide) guidelines "[i]f death resulted, or the offense was intended to cause death or serious bodily injury", but only "if the resulting offense level

is greater than that determined" under the permutations of arson described in the guideline. Though we posed the question, "analogous to what?"--an ambiguity never answered by the government or courts below--the Court affirmed because the Guideline shows as a statutory reference 18 U.S.C. §1111, murder on a federal enclave, which categorizes a death committed during an arson as first-degree murder. Though the first-degree murder Guideline expressly invites a "departure" where a death is not premeditated and "the defendant did not cause the death intentionally or knowingly"--in which case "the extent of the departure should be based upon the defendant's statement of mind" (Commentary, Application Note 1, §2A1.1 (quoted in full at a38)-- the Court affirmed the district court's refusal to "depart" as a "discretionary" matter: "The sentencing court was well aware of its discretionary power to depart under §2A1.1, but chose not to do so after specifically identifying several aggravating factors, e.g., Ferranti's scheme to defraud an insurance carrier, his knowledge of tenants' presence in the building, the use of an accelerant, and his decision to set a building that was in part residential afire at night."(a31).

The Court should hold the Guidelines ambiguous as to whether 2A1.1 was the proper "analogous" Guideline in the first place. If §1111 controls, 2A1.1 (first-degree) would be used in all cases where a death results from an arson. This would render language in the arson Guideline cross-reference meaningless, in that 2K1.4(c) states that where death resulted a court should use the "most analogous [homicide] guideline" *if* "the resulting offense level is greater than that determined

here." In every case, 2A1.1 would yield a level "greater than that determined" under an arson calculation, because 2A1.1 carries a base level of 43, and the highest arson level is 24. Further, if 2A1.1 were meant to control in every case where death resulted, then the Commission would have cross-referred to that Guideline specifically, as it has done in the sexual abuse Guideline, USSG §2A§3.1(c) ("if a victim was killed under circumstances that would constitute murder under 18 U.S.C.§1111 had such killing taken place within the territorial...jurisdiction of the United States, apply §2A1.1"). The Court should hold that the use of §2A1.1 cannot be sustained on the basis that a murder prosecuted under § 1111 would result in sentencing under §2A1.1. See Lewis v. United States, No. 96-7151, 1998 U.S. LEXIS 1604, *21 (March 9, 1998) (§1111 is "applicable only on federal enclaves").

This is far from an isolated problem that can be deferred: many courts have sentenced for arsons resulting in death. Significantly, moreover, no other court has sanctioned the "straight" use of the *first*-degree Guideline in a case similar, or even worse, than this: some started with second-degree murder as the "most analogous" guideline; others "departed" to the second degree level on a finding, explicitly or implicitly, that the death was not "knowing" and "intentionally" caused.

The only two cases in which a defendant had raised a sentencing challenge where 2A1.1 was found "most analogous"and a departure was not sanctioned, were Seventh Circuit cases United States v. Martinez, 16 F.3d 202 (7th Cir. 1994) (where defendant argued that his arson resulting in death

was not analogous to felony murder because a participant was killed) and United States v. Prevatte, 66 F.3d 840 (7th Cir. 1995)(defendant argued that the first-degree murder statute was not apt because his was a bombing case, not arson). However, other Seventh Circuit cases pointed to the second-degree murder Guideline. In United States v. Menzer, 29 F.3d 1223 (7th Cir. 1994), the district court found the case "close" but found 2A1.2 (second-degree murder) "most analogous"; it departed upward because the defendant had set a residence afire, intending to harm multiple victims, and two victims had died. In United States v. Martin, 63 F.3d 1422, 1435 (7th Cir. 1995). where two firefighters died, Judge Posner declined to rule that first-degree murder was always the appropriate analogy when firefighters die as a result of arson, instead writing that the inquiry in any case depended on the facts.

While the Second Circuit here stated that facts were important, it affirmed use of 2A1.1 where the facts were no "worse" than any other case where the second-degree Guidelines was used. Moreover, the all-but-automatic use of 2A1.1 because a firefighter died in circumstances such as those present here, appears inconsistent with other parts of the Guidelines. For instance, Policy Statement §5K2.1 counsels distinctions even when death results--*e.g.*, whether there were multiple deaths or whether the guideline already accounts for causing a risk of harm (as the arson Guideline (a41) does.

Comparisons with other cases show seemingly whimsical differences: In United States v. El Zoubi, 993 F.2d 442 (5th Cir. 1993), where the arsonist-nephew of the store

owner was killed, the trial court did not find 2A1.1 "most analogous"; instead it used "involuntary manslaughter" and then departed upward to a ten-year sentence. The Fifth Circuit disagreed, deciding that first-degree murder was "most analogous"; but it suggested that a *downward* departure to second-degree murder (with a sentence of 14-17 years) would have been appropriate. (The government had not cross-appealed, however, and so the ten-year sentence stood).

District Judge Weinstein refused to depart (actually he said he would reach the same result whether starting upward or downward because arson has been a serious problem), but his rationale--that the firefighter's death was "foreseeable" and thus "knowingly" and intentionally" caused--constituted a legal conclusion that *no* other court has drawn. In every case in which a firefighter was killed as a result of arson, courts have departed, finding that death was not knowing and intentional.

Thus, in United States v. Paden, 908 F.2d 1229 (5th Cir. 1990), the defendant set a fire to destroy a building and recover insurance. Like here, he used an accelerant;[7] and deliberately set a big fire, in the evening, to destroy the building. The fire spread to a second building and a firefighter was killed. Although the property was a business building, it was close to other buildings. The court departed downward to

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[7]That an "accelerant" was used should not constitute an "aggravating factor": The Court wrote, for instance, that the fact that an accelerant was used was an "aggravating" element. In the Second Circuit's own United States v. Katsougrakis, 715 F.2d 769, 772 (2d Cir. 1983), the Court characterized a fire started by using "uncontained gasoline" as "a typical arson.

11- and 17- year sentences for the defendants (contrast this with the 36-plus years here), finding that the death of the firefighter was not knowing or intentional.

In United States v. Ryan, 9 F.3d 660 (8th Cir. 1993), modified, 41 F.3d 361 (8th Cir. 1994) (*en banc*), the defendant burned his unsuccessful business, used an accelerant, set the fire in the evening in six separate places, deliberately disabled the fire alarm and thwarted the fire department's entry by removing the key from the fire box; and though the building was a business building, it was an urban area with people living close by. All "aggravating" factors noted here was present there, plus more. Two firefighters were killed. Nonetheless, finding defendant's actions reckless and a gross deviation from reasonable care, and that defendant was aware of risk of death, the court ruled that the deaths were not knowing and intentional, departed to 38 (midway between first and second degree murder), and, after adding obstruction points, sentenced defendant to 27 1/3 years (without adding good-time months).

United States v. Martinez, 16 F.3d 202 (7th Cir. 1994) involved a defendant paid to recruit others who then bombed pornographic bookstores as part of shakedown scheme. A participant was killed when a bomb blew up in a taxi. Although the court deemed the result the equivalent of felony murder and used the first-degree murder guideline, it departed downward after holding that death was not knowing and intentional. The defendants were sentenced to 10, 9, 8 and 3 years. In United States v. Martin, 63 F.3d 1422 (7th Cir. 1995), after the jury declined to impose a life sentence, the

court imposed a 50-year sentence on the 45-year-old defendant. The appellate court remanded. Though defendant had not moved for a departure, Judge Posner instructed the court to consider one on the basis of the defendant's mental state.

In United States v. Menzer, 29 F.3d 1223 (7th Cir. 1994), the district court found second-degree murder "most analogous", departed upward 5 levels to 38, and imposed a sentence of 40 years. Menzer involved a nighttime fire set during an acrimonious divorce with charges of sexual abuse of the children. The fire was set in a building where the wife and children were sleeping in an upstairs residence. Two children were killed. Despite this evidence of an intent to harm his wife and/or children, the court found second-degree most analogous, added 2 levels for obstruction and 2 levels for vulnerable victims, and then departed upward 5 levels because of multiple victims and intent to harm, which the Seventh Circuit approved. (Again the court did not add good time credit).

Equally- or more severe sentences have been imposed only where there was an *intention* to cause harm: In United States v. Gullet, 75 F.3d 941 (4th Cir. 1996), the court found first-degree murder analogous, and the defendant did not even suggest the propriety of a downward departure because of proof that the deaths were intentional. Gullet had made a bomb intending to kill a business partner and a witness. Instead, the bomb exploded and killed the partner's son. The court, considering defendant's life-expectancy and adding good time, sentenced the defendant to 38 years, out of which he will serve 33.1 (his life expectancy is 33.7 years). See also United States

v. Prevatte, 66 F.3d 840 (7th Cir. 1995) (Prevatte II), where the Seventh Circuit remanded twice to consider life expectancy. The district court had first imposed a life sentence; the Court of Appeals held it improper and held it improper to have failed to "consider" a downward departure if the death not knowing and intentional. On remand, the court purported to depart "downward" to 53 years. The appeals court wrote that it was without power to correct the sentence; but remanded again.

It is plain that there must be some guidance. The Court should accept the case to rule that the use of the first-degree murder Guideline is not proper. It should so rule not only because the resulting sentence is harsh--far more harsh than State courts would impose if a defendant were convicted of felony murder, inviting local arsons to be prosecuted federally--but because the Guidelines are at least ambiguous in calling for such a harsh sentence, and have produced conflicting, disparate, and at times seemingly whimsical sentencing results, in derogation of the principles behind the Sentencing Guidelines, which are meant to ensure uniformity and proportionality in the sentencing process.

IV. The Court Should Resolve The Conflict Among Circuits Regarding Whether Good Time Credit Can Be Obviated.

The Second Circuit agreed with the Fourth Circuit in United States v. Gullett, 75 F.3d 941, 951 (4th Cir.), *cert. denied*, 117 S.Ct. 134 (1996), that it was appropriate to add back into the sentence the good time credits that the defendant could expect to receive. Though also citing Judge Posner's

concurring decision in United States v. Prevatte, 66 F.3d 840, 848 (7th Cir. 1995) as support for what it did (see a33), in fact the Seventh Circuit has held, *after* Prevatte, that it is not proper to deny a prisoner sentenced to a term of years not defined by his natural life the right to receive good time credits, because the statute, 18 USC §3624(b)(1) provides Congress' determination that those credits shall be given to prompts prison discipline. This Court should resolve the conflict.

V. The Court Should Grant The Writ To Enforce Limitations Required By The Confrontation Clause On The Use Of Out Of Court Statements Admitted Under The "Excited Utterance" Hearsay Exception, To Ensure Its Constitutional Application

In White v. Illinois, 502 U.S. 346 (1992), this Court held that the Confrontation Clause was no bar to the introduction of testimony properly admitted pursuant to the "spontaneous declaration" hearsay exception. The Court did not rule on any limitation to satisfy the exception. Rather, it "t[ook] as a given.. that the testimony properly f[ell] within the relevant hearsay exce[illegible]on (502 U.S. at 351 n.4).

In Idaho v. Wright, 497 U.S. 805 (1990), this Court, citing 5 J. Wigmore, Evidence 1420, p.251 (Chadbourn rev.1974), noted that the theory of the hearsay rule is "that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." But, the Court summarized, there are cases--hearsay exceptions--where "the declarant's

truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility".

While Idaho dealt with a different exception, the Court noted the basis for admissibility of the "excited utterance" exception as being that "such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." 497 U.S. at 820. The White v. Illinois Court later emphasized that the theory behind the exception for *spontaneous* declarations is that a statement made "in a moment of excitement, without the opportunity to reflect on the consequences of one's exclamation", is likely accurate. 502 U.S. at 356.

The exception has gone far from its roots and has run astray. Here, consistent with a host of federal "excited utterance" cases authorizing untestable statements made long after "startling events", the Second Circuit af med admission of Marziano's testimony that Tocco had said he had just "lit a fire" with Mario and that they had done it "for Jack", though it was necessarily made long after the fire and though there were so many intervening circumstances after the fire that trustworthiness was hardly assured, much less to the extent that "cross-examination would be superfluous": Not only had the declarant "reflected" sufficiently to get into his car and drive across the City to the witness's house to obtain and ingest cocaine, but the witness (Tocco's drug supplier), who *knew*

Tocco's propensities, testified that he had not believed Tocco. Additionally, the declarant would not have been "excited" by the fire had he been the one that set it.

The Second Circuit retreated from a firm ruling that the fire was the type of "startling event", stating instead that "[t]he fire itself *may* [emphasis added] constitute a startling event," but "even if it did not, certainly Tocco's ...realization that people could be trapped inside the burning building, which he had helped set, would comprise a startling event."

That the Court could not with certainty even *identify* a "startling event" that triggered a statement required by the Federal Rules and the Constitution to be so reliable that cross-examination is not required, confirms that the hearsay exception was not applied properly here. That the Court ruled that Tocco's "realization" a "startling event" (if he had such "realization", which was unproven), is also a stretch: "realizing" something is not a "startling event"; it is a thought process itself. This Court should accept the case and hold that White v. Illinois does not embrace the type of statement allowed here. It should hold that evidence of this nature runs afoul of the Confrontation Clause.

VI. The Court Should Interpret Federal Rule Of Evidence 602, Which Precludes A Witness From Testifying To A Matter "Unless Evidence Is Introduced Sufficient To Support A Finding That The Witness Has Personal Knowledge Of The Matter." And Should Hold The Evidence Here Insufficient.

The most damaging part of the so-called "excited

utterance" was the statement that they had done it "for Jack". There was nothing to show that anyone had told Tocco so, or that Tocco had been with "Jack", or that Tocco had seen Jack.

This Court has not addressed the nature of proof required to establish the requisites of Federal Rule of Evidence 602, called the "'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'". Advisory Committee Notes, 1972 Proposed Rule of Evidence 602. In United States v. Owens, 484 U.S. 554 (1988), the Court was asked to consider whether Rule 602 was satisfied where a prison correctional counselor whose memory was severely impaired in an attack recalled having identified respondent from photographs, but could not recall the circumstances. The Court did not, however, reach the issue, and on remand, the Court of Appeals found the Rule satisfied because it was a matter of credibility.

Here it was no "matter of credibility" that could be tested. The only basis to assess Tocco's personal knowledge was the hard evidence at trial.

The Court's ruling--that because there was no evidence of forced entry a jury could find that Tocco had "obtained the key from the store owner"-- was conjecture. There was *no* evidence that Tocco had been the one who had used a key to enter the store, *or* that Petitioner had given him the key. (Mario, if he were involved, could have had the key.) The additional rationale--that "witnesses testified that when Ferranti required help with his properties, he typically solicited his brother Mario who, in turn, recruited his friends"--also gave

rise to conjecture, not reason. No one testified that Tocco had been "solicited" by "Mario" in the past; moreover, being "recruited" to "help with properties" hardly supplies a basis for "knowledge" that Ferranti "owned" the store (actually he did not; he leased it) *or*, more importantly, that the fire had indeed been set "for Jack". A factfinder thus could *not* --to use the Court of Appeals' words--"*reasonably* [emphasis added] decide" that Tocco had personal knowledge that he and Mario Ferranti had set the fire "for Jack".

The Court should grant the writ to discuss, for the first time, the standard and nature of proof required to show this most basic of safeguards--personal knowledge.

CONCLUSION

This Court should grant *certiorari* to put an end to unwarranted federal jurisdiction over local arsons, or at least to decide whether Russell's *per se* rule survives Lopez's "substantiality" requirement in a case involving real estate dealt with on a purely local basis. It should grant the Writ to decide which Sentencing Guideline applies where arson results in an unintended death, and resolve inter-circuit conflicts concerning arson-homicide sentencing and denial of good time credits. . It should also give authoritative interpretation to the basic evidentiary rules for the first time.

March 1998

Respectfully submitted,

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APPENDIX

Court of Appeals' Decision of January 16, 1998 a1

The Arson Statute, 18 USC § 844(i) a37

First-Degree Murder Sentencing Guideline, USSG § 2A1.1 a38

Second-Degree Murder Sentencing Guideline, USSG § 2A1.2 a40

Arson Sentencing Guideline, USSG § 2K1.4 a41

UNITED STATES OF AMERICA, Appellee, v. THOMAS TOCCO, Defendant, MARIO FERRANTI; JACK FERRANTI, Defendants-Appellants.

Docket Nos. 96-1266(L), 96-1282

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1998 U.S. App. LEXIS 1005

February 4, 1997, Argued

January 16, 1998, Decided

SUBSEQUENT HISTORY: As Amended February 11, 1998. As Corrected February 13, 1998.

PRIOR HISTORY: Defendant appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), convicting him, after a two-week jury trial, of arson homicide in violation of 18 U.S.C. § 844(i), arson conspiracy in violation of 18 U.S.C. § 371, 16 counts of mail fraud in violation of 18 U.S.C.§ 1341, and witness tampering in violation of 18 U.S.C. § 1512(b).

DISPOSITION: Affirmed.

COUNSEL: VIVIAN SHEVITZ, Mt. Kisco, New York (Jane Simkin Smith, Carol E. Gette, Mt. Kisco, New York, of counsel), for Appellant Jack Ferranti.

LAUREN J. RESNICK, Assistant United States Attorney,

Brooklyn, New York (Zachary W. Carter, United States Attorney, Emily Berger, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), for Appellee United States of America.

JUDGES: Before: WINTER, Chief Judge, CARDAMONE and CABRANES, Circuit Judges.

OPINION: CARDAMONE, Circuit Judge:

This criminal prosecution arose out of a late-night fire in a three-story building in Queens, New York, on February 24, 1992 during which a firefighter lost his life. The subsequent investigation focused on the defendant Jack Ferranti (defendant or appellant) as the person who set the blaze in an effort to cut his losses from a failing business and to profit through the collection of insurance proceeds. Ferranti appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), convicting him following a two-week jury trial of arson homicide in violation of 18 U.S.C. § 844(i), arson conspiracy in violation of 18 U.S.C. § 371, 16 counts of mail fraud in violation of 18 U.S.C. § 1341, and witness tampering in violation of 18 U.S.C. § 1512(b).

On appeal Ferranti raises a number of issues of apparent legal substance, one or two of which are matters of first impression, challenging his conviction for arson homicide and a sentence of 435 months in prison -- a period of time five

years longer than his life expectancy. Although these legal challenges are skillfully articulated, they turn out, upon close analysis, to be unpersuasive and only hopeful thoughts. Therefore, for the reasons given below, we affirm.

BACKGROUND

I The Fire

Defendant Jack Ferranti owned a retail clothing store called "Today's Styles" which he operated in space he rented on the ground floor of a building located at 64-65 Grand Avenue in Maspeth, Queens. The two upper floors of the building consisted of four occupied residential apartments that housed eight people. At 5 p.m. on February 24, 1992 store employee Teresa Rodriguez closed the store. Just before 11 p.m., a witness saw smoke pouring out from the side of the building and called the fire department. When it responded and the fire trucks arrived at the scene, two firefighters entered the building and went to the second floor to see if any people were trapped inside. During the search one of the firefighters fell to his death from a second-story window. Two dozen other firefighters suffered minor injuries, and several building residents were treated for smoke inhalation. The structure was destroyed, its residents left homeless.

After successfully fleeing the burning building, two residential tenants, Shelley and Michelle Anthony, spoke briefly with a man who asked them if all of the residents had escaped the fire. From a series of photographs, Shelley Anthony later identified defendant Thomas Tocco as the man

with whom he spoke on the night of the fire. Although unable to make a definitive identification, Tocco's photograph was one of two or three that Michelle Anthony selected from the series presented to her.

The following morning investigators found evidence indicating that the fire was arson committed by someone with access to the retail store because there was no evidence of forced entry. Two distinct flammable liquid patterns were found on the floor of the dressing room area in the rear of the retail store that investigators believed had been intentionally placed several feet apart and ignited. Between the two patterns was a portable electric heater plugged into the wall. Investigators concluded that whoever set the fire intended to lead them to believe that it was caused by a malfunction in the heater. Testing by the FBI laboratory, however, found no evidence to suggest that the heater's circuit was "energized" at the time of the fire, *i.e.*, there was no electrical arcing, and therefore investigators concluded that the unit could not have been the cause of the fire's ignition.

Ferranti initially told investigators that he had been out of town for several days when the fire occurred. He also said that a former employee, whom he had since fired, had purchased the heater for the store a couple of years earlier. When questioned by police, that employee denied making such a purchase. While Rodriguez, a current employee, initially told police there had been a portable heater at the store, her friend, Betzida Aviles, who had been at the store on the day of the fire, told police that there was no heater there. Before the grand jury,

Ms. Rodriguez recanted, testifying that Ferranti had met with her on the morning after the fire at his real estate office in Manhattan and instructed her to lie to the investigators and tell them that there had been a portable electric heater at the store.

In the weeks following the fire, Ferranti filed a claim with his insurance company under his fire policy. The company asked attorney Stuart Markowitz to handle its investigation of the Today's Styles fire, and Markowitz corresponded with Ferranti and his representative requesting information about the fire. On June 11, 1992 after the company had examined Ferranti under oath and requested an examination of employee Rodriguez, Ferranti wrote the company withdrawing his insurance claim.

Defendant was subsequently indicted, along with his brother, Mario Ferranti, and Thomas Tocco, on charges of arson homicide, arson conspiracy, witness tampering, and mail fraud. Ferranti and his brother successfully moved for severance, and their case proceeded to trial separately from co-defendant Tocco.

II The Trial Proceedings

At trial the government developed the connection between defendant Ferranti, his brother Mario, and Tocco. In addition to the Anthonys' identification of Tocco at the fire scene, another witness testified that she had seen a dark-colored Cadillac matching the description of Tocco's car parked across the street from the building 10 to 15 minutes before she noticed smoke coming from inside it. She also stated that when she

later observed the fire, the Cadillac was gone. Government witness Vincent Marziano, a convicted felon and friend of Tocco and Mario Ferranti, provided the link between Tocco and Ferranti. Marziano testified that at 2 a.m. on the night of the fire, Tocco came to his Bronx home and told him that he and Mario Ferranti had just set a Queens building on fire for Jack Ferranti. One week later, Marziano warned Mario Ferranti that Tocco had confessed their crime to him, and Mario responded by nodding his head affirmatively.

The government also produced evidence of Jack Ferranti's motive: to obtain an insurance award for an ailing business. Although he carried no insurance on his other store, Jack Ferranti renewed Today's Styles' fire policy, which had lapsed at the end of 1991, in the weeks immediately preceding the fire. He had informed investigators that his business was doing well, but evidence at trial -- including a business diary and testimony of the store's employees -- indicated that business had been extremely slow. Moreover, Ferranti had been unable to pay rent, which was scheduled to increase, on the store's five-year lease for the three months preceding the arson. Firefighters and insurance adjusters who inspected the building after the blaze discovered empty clothes racks with little debris beneath them, indicating that inventory had been removed from the store prior to the fire.

In addition to this circumstantial evidence, the government called as a witness Lisa Ziccardi, who testified that in the months prior to the fire, Jack Ferranti had told her that he would burn the heavily-insured store if business did not

improve. Ziccardi had submitted a signed affidavit to investigators reporting Ferranti's statements and had similarly recounted his statements to an insurance company investigator. Yet, in the government's initial examination of her, she claimed a memory loss regarding Ferranti's statements, even when confronted with her own sworn, hand-written affidavit. Judge Weinstein subsequently held a hearing -- outside the jury's presence -- at which he concluded Ziccardi was feigning memory loss as the result of coercion by Ferranti. Because the defendant had effectively made her unavailable as a witness, the trial court ruled her sworn affidavit would be admissible as substantive evidence, under Fed. R. Evid. 803(5), if her feigned memory loss continued. When Ziccardi was recalled to the stand, she reluctantly stated that she remembered hearing Ferranti state his intention to set fire to the business. Because Ziccardi now recalled and testified to Ferranti's prior statements, Judge Weinstein denied the government's motion to introduce into evidence her sworn affidavit.

Jack Ferranti's defense consisted primarily of two experts who challenged the conclusion that the fire was intentionally set. First, Thomas Klem, a former employee of the National Fire Protection Association, testified that the fire could have been caused by an electrical short in the building since he had observed evidence of electrical arcing on the electrical outlet that was connected to the portable heater -- evidence which he asserted had been subsequently altered. Second, Michael Higgins, who was called by the defense as a chemical expert, testified that the police reports did not

conclusively establish that traces of a flammable accelerant were present in the materials taken from the store. But Higgins conceded that the large quantities of water used to extinguish a fire may wash away the chemical evidence of an accelerant.

The jury convicted Ferranti of arson homicide, arson conspiracy, 16 counts of mail fraud, and witness-tampering for his intimidation of Rodriguez prior to her grand jury testimony. The jury convicted his brother Mario Ferranti of arson conspiracy. Jack Ferranti moved unsuccessfully before the district court after trial to vacate his convictions on the grounds that the government's proof on the interstate commerce nexus to support the arson homicide charge was insufficient and that the mailings alleged in the indictment were too remote to constitute mail fraud.

After a lengthy restitution hearing, the district court sentenced Ferranti on the arson homicide conviction to 435 months in prison and five years of supervised release. On the remaining counts of conviction, that is, conspiracy to commit arson, mail fraud, and tampering with a witness, the district court imposed the statutory maximum sentences, with each to run concurrently with the arson homicide sentence. Judge Weinstein additionally ordered Ferranti to pay: (1) restitution in the amount of $ 1,455,799.79, pursuant to 18 U.S.C §3663; (2) a statutory fine of $ 2,911,599.58 (twice the restitution amount), pursuant to 18 U.S.C.§3571(d); (3) a $ 318,037.57 fine for the costs of imprisonment, pursuant to U.S.S.G. § 5E1.2(i) (with money to be deducted to cover support for Ferranti's former wife and child if such a need is properly

certified); and (4) a total amount of $ 950 in special assessments ($ 50 for each of the 19 counts), pursuant to 18 U.S.C. § 3013(a)(2)(A).

Ferranti challenges his conviction and his sentence on numerous grounds, each of which we address in the following discussion. Although his brother Mario filed a notice of appeal, he subsequently moved to withdraw his appeal.

ANALYSIS

I Sufficiency of the Evidence

Ferranti challenges his arson homicide, mail fraud, and witness tampering convictions on the ground of insufficient evidence. A defendant challenging a conviction for insufficient evidence bears a heavy burden, *United States v. Russo*, 74 F.3d 1383, 1395 (2d Cir.), *cert. denied*, 136 L. Ed. 2d 213, 117 S. Ct. 293 (1996), because we view the evidence in the light most favorable to the prosecution. *See United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989). We defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences. See *United States v. Pelaes*, 790 F.2d 254, 259 (2d Cir. 1986). A conviction so challenged must be affirmed when we believe "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, (1979); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997).

A. Arson Conviction

Ferranti contends there is insufficient proof to support the interstate commerce element of the arson homicide offense.

Citing United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), he urges that to support a conviction under the federal arson statute, 18 U.S.C. §844(i), the government must establish the criminalized activity's substantial impact on interstate commerce.

In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act, 18 U.S.C. §922(q)(1)(A), a statute criminalizing the knowing possession of a firearm in a school zone, on the ground that Congress exceeded its powers under the Commerce Clause when it enacted the statute. The Court found problematic the fact that the statute "neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce." 115 S. Ct. at 1626. In particular, the Court emphasized that the Gun-Free School Zones Act "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 1631. Unlike the statute in *Lopez*, the federal arson statute does contain such a jurisdictional element, which provides that

> whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . .

18 U.S.C. §844(i) (emphasis added). In considering other federal criminal statutes containing jurisdictional elements, we

have held that Lopez did not elevate the government's burden in proving a nexus to interstate commerce. *See United States v. Farrish*, 122 F.3d 146, 149 (2d Cir. 1997) ("We find nothing in *Lopez* to suggest that the Court intended to heighten the threshold for establishing jurisdiction under such statutes."); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir.) (holding that Lopez did not raise the government's burden under the federal money laundering statute, 18 U.S.C. § 1956(a)(3)(B), which contains a jurisdictional element requiring the financial transaction to affect interstate or foreign commerce "in any way or degree"), *cert. denied*, 117 S. Ct. 1713 (1997). We hold that in light of the fact that, unlike the statute in Lopez, § 844(i) does contain a jurisdictional element, *Lopez* did not elevate the government's burden in establishing jurisdiction in a federal arson prosecution. *See United States v. Flaherty*, 76 F.3d 967, 974 (8th Cir. 1996) ("The *Lopez* decision did not address the amount of evidence required to prove an explicit jurisdictional element of an offense and does not control this case."). Hence, to satisfy § 844(i) the government need only prove that the arson in question destroyed or damaged property either "used in" or "used in any activity affecting" interstate commerce.

Sufficient evidence to establish the interstate commerce nexus for the arson homicide offense was produced in this case. In *Russell v. United States*, 471 U.S. 858, 862, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), the Court established a *per se* rule that, for purposes of § 844(i), rental property constitutes property that is used in an activity affecting interstate commerce. Inasmuch as §844(i) contains a

jurisdictional element, distinguishing it from the type of statute addressed in Lopez, we see no reason to conclude, as Ferranti apparently would have us do, that Lopez overruled the Court's holding in *Russell. See United States v. DiSanto,* 86 F.3d 1238, 1248 (1st Cir. 1996) ("We find no basis to conclude that *Lopez* in any way undercuts *Russell's* holding that rental property is unquestionably an activity that affects interstate commerce within the meaning of 18 U.S.C. § 844(i)."), *cert. denied*, 137 L. Ed. 2d 310, 117 S. Ct. 1109 (1997). Under the jurisdictional standard outlined in § 844(i), the government offered enough proof to allow a rational jury to conclude that the building was rented for both commercial and residential purposes at the time of the arson, thereby conclusively establishing the requisite connection between the burned building and interstate commerce.

B. Mail Fraud Convictions

The jury convicted appellant on 16 counts of mail fraud (counts 3 through 18 of the indictment) based on mailings he made in order to obtain money fraudulently from his insurance company. He challenges 15 of those 16 counts. While conceding that the mailing charged in count 14 -- the proof of loss form -- was made in furtherance of the fraudulent scheme, he maintains that the mailings underlying the remaining counts are too remote to support conviction.

Underlying the discussion of these mail fraud convictions is the rule that a person who launches a fraudulent scheme through the use of the mails is criminally liable for all consequent mailings that occur. This rule is logical but severe

-- likened perhaps to the tyranny of inertia -- which in this case ensnared defendant in further mail fraud counts beyond his initial mailing even though, for reasons of his own, he would have stopped if he could that which he had originally started.

A mail fraud conviction under 18 U.S.C. § 1341 requires proof that there was (1) a scheme to defraud (2) furthered by use of the mails (3) for the purpose of obtaining money or property. *United States v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995). Ferranti contests only the second prong. To meet prong (2) the government must show that the defendant caused the mailing and that it was in furtherance of a fraudulent scheme. *See United States v. Slevin*, 106 F.3d 1086, 1089 (2d Cir. 1996).

We have construed § 1341's causation requirement liberally. *See, e.g., United States v. Bortnovsky*, 879 F.2d 30, 38-39 (2d Cir. 1989). In order to show that the defendant "caused" the mailing, it need only be shown that he acted "with knowledge that the use of the mails will follow in the ordinary course of business," or that "such use can reasonably be foreseen, even though not actually intended." *Pereira v. United States*, 347 U.S. 1, 8-9, 98 L. Ed. 435, 74 S. Ct. 358 (1954). Moreover, a mailing is in furtherance of a fraudulent scheme when it is "incidental to an essential part of the scheme," see id. at 8, or "a step in [the] plot," *Badders v. United States*, 240 U.S. 391, 394, 60 L. Ed. 706, 36 S. Ct. 367 (1916). A fact-specific inquiry must be made to determine intent, that is to say, "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time." *Schmuck v. United*

States, 489 U.S. 705, 711, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989).

We have said, in general, that regardless of the identity of the sender, mailings sent in connection with an ordinary insurance claims process are related to an insurance fraud scheme. *See, e.g., Bortnovsky*, 879 F.2d at 39-41 (determining that a letter from insurance adjuster advising defendants to preserve their rights was in furtherance of fraudulent scheme). Conversely, a mailing that places the defrauded insurer on notice of the fraud, impedes the execution of the fraud, or discloses the nature of the fraud, may not be said to be in furtherance of a fraudulent scheme. *See United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992); *United States v. Pacheco-Ortiz*, 889 F.2d 301, 305 (1st Cir. 1989); *United States v. Leyden*, 842 F.2d 1026, 1030 (8th Cir. 1988).

We are persuaded here that the evidence supports Ferranti's conviction on all of the mail fraud counts. The use of the mails alleged in counts 3 through 18 -- correspondence regarding insurance reimbursement following an initial request -- was clearly foreseeable. Further, that use was in furtherance of defendant's fraudulent scheme. To explain how the various mailings were in furtherance of Ferranti's fraudulent scheme, we divide them into the following five categories: (1) Requests for Information; (2) Letter of Representation; (3) Confirmation Letters; (4) Letter Acknowledging Receipt of Proof of Loss; (5) Letter Withdrawing the Insurance Claim.

(1) Requests for Information: Counts 3, 4, 5, 6, 16 and 17. The mailings in counts 3 and 5 were letters sent to Ferranti

on behalf of the insurer requesting information regarding the store's financial situation, Ferranti's alibi, and the names of employees who might assist in the investigation of the fire. Counts 4 and 6 related to letters sent to defendant on behalf of the insurer requesting him to file a sworn statement in proof of loss and attend a deposition. Similarly, the count 16 mailing was another request for information made to Ferranti's attorney on behalf of the insurer. Count 17 concerned a mailing sent to defendant's former employee on behalf of the insurer requesting the deposition of that employee.

Mailings related to an insurance investigation that are a part of the customary steps taken by an insurance carrier to decide whether to pay a claim under a policy, and not for the purpose of defeating the claim, are in furtherance of the fraudulent scheme under § 1341. *Koen*, 982 F.2d at 1109-10; *see also United States v. McClelland*, 868 F.2d 704, 708-09 (5th Cir. 1989); *cf. United States v. Castile*, 795 F.2d 1273, 1280 (6th Cir. 1986) (letter rejecting proof of loss and denying claim not in furtherance of scheme). A rational jury could conclude that these mailings involved routine requests for information needed to advance the insurer's normal claim processing and therefore furthered the scheme.

Alternatively, Ferranti attacks his convictions on counts 4 and 6 as being cumulative, since both mailings requested essentially the same information from Ferranti and the letter charged in count 6 was mailed to Ferranti at a new address only after the letter charged in count 4 was returned to the sender. A factfinder could reasonably find that the original

letter of count 4 was properly sent to Ferranti, but that Ferranti refused to accept it, thereby precipitating the need to mail the second letter that formed the basis for count 6. As a result, both letters would be in furtherance of the fraudulent scheme.

(2) Letter of Representation: Count 13. Count 13 concerned a mailing by Ferranti's attorney to the insurance company informing the insurer of his representation of Ferranti. This letter was made in furtherance of the fraudulent scheme because it served to facilitate correspondence during the course of the insurance claim process.

(3) Confirmation Letters: Counts 7, 8 and 9 and 10, 11 and 12. These six mail fraud counts are predicated on the mailing of three copies each of two letters. Counts 7 through 9 were based on a letter mailed on behalf of the insurer confirming the oral rescheduling of Ferranti's deposition. A copy of this letter was sent to Ferranti's two known addresses as well as to Ferranti's public adjuster representative, Henry Gritz. Counts 10 through 12 were based on a letter mailed on behalf of the insurer confirming the oral re-rescheduling of Ferranti's deposition. Again, two copies were sent to Ferranti, and one copy was sent to representative Gritz.

Ferranti attacks his convictions under these counts on two grounds. First, he characterizes these mailings as mere confirmations of prior oral statements that therefore cannot be considered as being in furtherance of the fraudulent scheme. On the contrary, these confirmations were part of the routine insurance claims process that furthered the collection scheme by informing Ferranti of his scheduled deposition. *See*

McClelland, 868 F.2d at 707-08 (reasoning that a confirmation of an oral statement made during a routine insurance claims process could provide a basis for a mail fraud conviction). A rational jury could find that the confirmation letter was sent to reschedule Ferranti's deposition so that his claim could be processed. This is especially true given the fact that the initial oral communications rescheduling Ferranti's deposition did not directly involve Ferranti.

As an alternative challenge, Ferranti contends that even if the letters can serve as the basis for mail fraud convictions, each of the two letters supports only one conviction. However, separate mailings of the same document may support separate convictions under § 1341 when each is a necessary and reasonable step in the claim process. *United States v. Draiman*, 784 F.2d 248, 253 (7th Cir. 1986). As a result of Ferranti's complaint that he had not received an earlier mailing from the insurance company (i.e., the prior mailing involved in count 4), the insurer mailed a copy of each confirmation to Ferranti's representative and to Ferranti's two known addresses to ensure that Ferranti would receive each confirmation. Our reading of the record persuades us that a reasonable jury could believe that these mailings in triplicate were part of routine claim processing and thus furthered his scheme.

(4) Letter Acknowledging Receipt of Proof of Loss: Count 15. Count 15 concerns a letter to Ferranti's attorney on behalf of the insurer acknowledging the receipt of the proof of loss forms. These acknowledgement forms were also part of

routine insurance claim processing.

(5) Letter Withdrawing the Insurance Claim: Count 18. Finally, Ferranti's challenge to his conviction on count 18 gives us pause. This conviction was based on a letter written by Ferranti's attorney withdrawing his insurance claim in an effort to cover-up his unsuccessful scheme. The government urges that because withdrawal was essential for the successful cover-up of the unsuccessful scheme, this mailing was in furtherance of the scheme. We agree that a mailing is in furtherance of a scheme when "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Lane*, 474 U.S. 438, 451-52, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986) (*quoting United States v. Maze*, 414 U.S. 395, 403, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974)). Although in the case at hand, Ferranti's withdrawal letter ended his unsuccessful scheme to obtain insurance proceeds fraudulently, the attempt at concealment was directed at avoiding -- or perhaps, more accurately, limiting -criminal liability. A factfinder could reasonably conclude that the withdrawal letter was designed to make the company feel secure that this fireloss claim was no longer being advanced and defer any complaint to the authorities about the defendant that their investigation of the fire had uncovered, thus making his apprehension less likely. Consequently, this conviction must also be affirmed.

C. Witness-Tampering Conviction

Ferranti challenges his witness-tampering conviction

on the ground that there was insufficient evidence to establish that he attempted to persuade witness Rodriguez, a store employee, to lie before the grand jury. An individual tampers with a witness in violation of 18 U.S.C. § 1512(b) when he "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding."

Although appellant admits that on the day after the fire he instructed Ms. Rodriguez to tell the police that there had been a heater in the store, he says there is no proof of any intimidation by him specifically directed at her grand jury testimony. He contends that because Rodriguez reported no pressure from him in the 15 months that elapsed from the time of the fire until her grand jury testimony, no rational jury could find him guilty of witness tampering. Ferranti's marshalling of the evidence, however, does not meet the heavy burden imposed on a defendant challenging a conviction based on an insufficiency of the evidence.

Circumstantial evidence was proffered from which the jury could infer that appellant corruptly attempted to influence Rodriguez' testimony before the grand jury. Rodriguez, who was a tenant in one of Ferranti's buildings, was also his employee at the Today's Styles store. The jury could reasonably have believed that as her landlord and her employer, he had a strong influence over her. Although Rodriguez testified at trial that she alone retained her attorney on the advice of her

sister-in-law after receiving the grand jury subpoena, there was proof that her sister-in-law was also a Ferranti employee, that Rodriguez' financial resources were insufficient to cover the $500 cash payment made to the attorney at their initial meeting, and that Ferranti accompanied her to the attorney's office for that meeting. From this, the jury could reasonably infer that after Rodriguez received a grand jury subpoena, appellant secured and paid for an attorney for her. Further, when Rodriguez testified at Ferranti's criminal trial, the jury had an opportunity to observe her demeanor in appellant's presence. In short, Ferranti's § 1512(b) conviction for witness tampering is amply supported by the record.

II Evidentiary Rulings

Ferranti contends that Marziano's testimony recounting Tocco's confession of his and Mario Ferranti's involvement in the fire was inadmissible hearsay admitted in violation of the Confrontation Clause. He also avers that Tocco's statement regarding Mario Ferranti's affirmative nod in response to Marziano's account of what Tocco had said was improperly admitted as an adoptive admission under Fed. R. Evid. 801(d)(2)(B). In addition, appellant takes issue with the district court's determination that, in light of Ziccardi's functional unavailability as a witness, her prior sworn statements before the grand jury were admissible. We consider each evidentiary issue in turn.

A. Tocco's Statement to Marziano

At trial, Marziano testified that Tocco came to his house at 2 a.m., within three hours after the fire began, and confessed that

he and Mario Ferranti had set fire to a Queens building for Mario's brother Jack. The government suggested three different theories under which this statement could be admitted: (1) as a declaration against Tocco's penal interest under Fed. R. Evid. 804(b)(3); (2) as an excited utterance under Fed. R. Evid. 803(2); and (3) as an inherently reliable statement under Fed. R. Evid. 804(b)(5)'s residual exception to the hearsay rule. Appellant asserts that none of these theories is valid and that the district court erred in allowing Marziano to testify with respect to the statement.

Admissibility determinations are reviewed under an abuse of discretion standard. *United States v. DeVillio*, 983 F.2d 1185, 1189 (2d Cir. 1993). Because we are of the view that it was not an abuse of the trial court's discretion to admit the statement as an excited utterance exception to the hearsay rule, we do not address the remaining theories of admissibility.

An excited utterance is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2). The rationale for this hearsay exception is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability. An excited utterance need not be contemporaneous with the startling event to be admissible under Rule 803(2). *See, e.g., United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (five or six hours between beating and statement).

Judge Weinstein believed Tocco's statement to Marziano qualified as an excited utterance. The record amply

supports this finding. The fire itself may constitute a startling event, but even if it did not, certainly Tocco's subsequent realization that people could be trapped inside the burning building, which he had helped set, would comprise a startling event. This knowledge was imparted to Tocco at 11:00 p.m., when the Anthonys told him that some people had remained in the burning building. Within three hours of this discovery, Tocco arrived at Marziano's residence, knocking on Marziano's window and exclaiming, "Mario and I lit a building for Jack." Tocco's excitement obviously had not subsided at that time. During his testimony, Marziano described Tocco's demeanor that morning as "all hyped" and "nervous." Under these circumstances, Tocco's statement was properly received as an excited utterance under Fed. R. Evid. 803(2).

Appellant also challenges the portion of the statement implicating himself *(i.e.*, the "for Jack" portion) as being improperly admitted because the prosecutor had failed to prove that Tocco had personal knowledge that he and Mario Ferranti had set the fire for defendant. The applicable rule of evidence, Fed. R. Evid. 602, states, in relevant part, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The test is "whether a reasonable trier of fact could believe the witness had personal knowledge." *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 764 (2d Cir. 1991). The record shows that while neither Tocco nor Mario Ferranti had an ownership interest in the Queens clothing store, a key was used to enter the store on the night of the arson. A

trier of fact could reasonably believe that Tocco obtained the key from the store owner and therefore was aware that the arson was committed at the owner's direction. Further, witnesses testified that when Ferranti required help with his properties, he typically solicited his brother Mario who, in turn, recruited his friends. A factfinder could have reasonably decided, based upon this evidence, that Tocco had personal knowledge that he and Mario Ferranti had set the fire for the defendant, Jack Ferranti.

Even though Tocco's entire statement is admissible under the Federal Rules of Evidence, appellant declares that its admission violated his constitutional rights under the Confrontation Clause. This argument is without merit. The Supreme Court teaches that the Confrontation Clause and the hearsay rules are both "generally designed to protect similar values." *Bourjaily v. United States*, 483 U.S. 171, 182-83, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). As a result, certain "firmly rooted" hearsay exceptions, ones that carry sufficient indicia of reliability and trustworthiness, will inevitably satisfy the Confrontation Clause. *White v. Illinois*, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992). An excited utterance is one such firmly established exception that escapes independent Confrontation Clause analysis. Id. at 357. Although the Supreme Court refers to "spontaneous declarations" throughout its opinion in White v. Illinois, it is clear the Court is discussing excited utterances, which do not require absolute contemporaneity with the event described. We say that because the Court directly refers to Fed. R. Evid.

803(2), the excited utterance exception, id. at 355 n.8, and also refers to a statement "offered in a moment of excitement," id. at 356. As a result, appellant's Confrontation Clause challenge lacks merit because Tocco's statement is admissible as an "excited utterance."

B. Testimony About Mario's Nod

Ferranti next challenges the trial court's decision to allow Marziano to testify as to Mario's nod in response to Marziano's account of Tocco's admission. Ferranti thinks this was error because the nod was ambiguous. This evidentiary ruling is reviewed for abuse of discretion. *United States v. Aponte*, 31 F.3d 86, 87 (2d Cir. 1994).

An innocent person accused of being involved in a crime will ordinarily deny such involvement or, at least, assert that the incriminatory statement is untrue. *United States v. Shulman*, 624 F.2d 384, 390 (2d Cir. 1980). Absent circumstances that render it more probable that a person would not respond to an accusation against him than that he would, such person's silence or other ambiguous conduct is admissible as an adoptive admission under Fed. R. Evid. 801(d)(2)(B). *United States v. Flecha*, 539 F.2d 874, 877 (2d Cir. 1976). Marziano testified that he cautioned defendant's brother, while the two of them were alone in an alley behind a bar, that Tocco was talking about their involvement in the arson. This is exactly the type of statement that an innocent person, under these circumstances, would normally deny. *See, e.g., United States v. Williams*, 577 F.2d 188, 194 (2d Cir. 1978) (reasoning that where defendant did not "vigorously assert[ ]" his

non-involvement in a conspiracy, his statements could constitute an adoptive admission). But Mario Ferranti nodded his head affirmatively in response to the warning. Thus, the court's ruling that Mario's nod constituted an adoptive admission about which Marziano could testify was not an abuse of its discretion.

The so-called ambiguity surrounding the meaning of Mario Ferranti's nod does not undermine the district court's admissibility determination. This evidentiary determination was preliminary to a decision as to what inference should be drawn from it, which was ultimately a question for the jury to assess, rather than for an appellate court. *See* Fed. R. Evid. 104(b); see also 8 Weinstein's *Federal Evidence* § 801.21[3] (2d ed. 1997).

C. Admissibility of Lisa Ziccardi's Prior Statements

Another evidentiary decision which has come under attack is the decision to admit Lisa Ziccardi's prior sworn affidavit in which she stated that Ferranti told her he intended to burn down his store for insurance money. When Ziccardi was initially called to testify at defendant's trial, she stated she was unable to recall Ferranti's prior statements even when shown her own affidavit. After a hearing outside the jury's presence, Judge Weinstein ruled that Ferranti had effectively procured the absence of a witness, and held that the affidavit would be admissible if she continued to feign memory loss. *See United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982) (reasoning that where, after an evidentiary hearing, the district court finds that defendant procured the absence of a witness,

that witness' out-of-court statements are admissible on the ground that defendant waived his Sixth Amendment right to confront the witness by his misconduct). Appellant contends Ziccardi's refusal to confirm her prior statements did not constitute absence within the meaning of *Mastrangelo*, and therefore it was error to rule the affidavit admissible. We need not address this issue because the affidavit was never admitted into evidence against appellant since after the court's ruling, Ziccardi returned to the witness stand and reluctantly testified to Ferranti's statements. As a result, the court thereafter denied the government's motion to introduce her sworn affidavit as substantive evidence.

III Deprivation of Fair Trial Claim

Ferranti next asserts that he was denied a fair trial as a result of prosecutorial misconduct, in combination with the trial judge's treatment of Ziccardi discussed above, that conveyed his disbelief of the defense's case.

A. The District Court's Treatment of Ziccardi

We see no prejudice to appellant in the district court's actions vis-a-vis witness Ziccardi. The admissibility ruling was made outside the jury's presence and therefore could not have conveyed any message of Judge Weinstein's alleged disbelief to the jury. With respect to the court's questioning of Ziccardi, it is settled law that a trial judge may actively participate in questioning to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings. When a judge's conduct is challenged as displaying bias against the defendant, the entire record must be examined to determine

whether the jurors have been so impressed by the judge's partiality that it affected their deliberations. *See United States v. Filani*, 74 F.3d 378, 385-86 (2d Cir. 1996). Our review of the record as a whole satisfies us that Judge Weinstein's participation did not demonstrate bias or deny Ferranti a fair trial.

B. Alleged Prosecutorial Misconduct

We next address Ferranti's allegations of prosecutorial misconduct during the government's examination of Marziano and during its rebuttal summation. In order to prevail on such a claim a defendant must demonstrate that the prosecutor's inappropriate comments caused "substantial prejudice." *United States v. Bautista*, 23 F.3d 726, 732 (2d Cir. 1994). To determine whether substantial prejudice exists, we weigh the severity of the alleged misconduct, the measures adopted to cure it, and the certainty of conviction absent the misconduct. *See Russo*, 74 F.3d at 1396.

Ferranti declares first that the prosecutor made an improper reference to other evidence during the government's examination of Marziano. Specifically, the prosecutor asked Marziano whether he was "aware" that the government had "a lot of other evidence" and could "figure out whether or not [Marziano] was being accurate." The comments embodied in this question were arguably improper, but we think no substantial prejudice resulted. The jury was promptly given curative instructions to disregard the statement and told repeatedly that it should only consider the evidence presented at the trial. Further, there was ample evidence, absent this

comment, to support appellant's convictions.

The remaining claim of prosecutorial misconduct centers on the government's rebuttal summation. Appellant alleges the prosecutor placed his own credibility at issue, argued facts not in evidence, accused the defense of slandering the victims, vouched for a government witness, and made inflammatory comments about defense counsel and a defense expert witness. The prosecution and the defense are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence. *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994). Under the invited or fair response doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal. *See United States v. Robinson*, 485 U.S. 25, 32, 99 L. Ed. 2d 23, 108 S. Ct. 864 (1988). In particular, where the defense summation makes arguments and allegations against the government, the prosecutor may respond to them in rebuttal. *See United States v. Rivera*, 971 F.2d 876, 883 (2d Cir. 1992); *United States v. Bagaric*, 706 F.2d 42, 60 (2d Cir. 1983). We review the allegedly improper prosecutorial statements during summation in the context of the entire argument before the jury to determine whether the defendant was deprived of a fair trial. *United States v. Pena*, 793 F.2d 486, 490 (2d Cir. 1986).

Each of the challenged statements in the prosecution's rebuttal were fair responses to the defense summation. Defendant cannot now complain about the issues raised and the atmosphere created by his own making through the defense

summation. To the extent that any of the comments could be labelled improper, none were so egregious as to infect the proceedings in such a manner as to deprive defendant of due process of the law. *See Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).

IV Challenges to the Sentence

A. Applicable Guideline for Arson Homicide

Ferranti was sentenced to 435 months in prison and ordered to pay restitution and a hefty fine. His first challenge to his sentence is the district court's use of U.S.S.G § 2A1.1 as its basis. Guidelines § 2K1.4 governs sentencing for arson homicide. When arson results in death, "or the offense was intended to cause death or serious bodily injury," § 2K1.4(c)(1) directs the sentencing court to apply the guideline listed in Chapter Two, Part A, the section of the Guidelines dealing with homicide, that is most analogous to the arson offense. Appellant urges that since in this case the fireman's death was unknowingly and unintentionally caused, the sentencing court erred in relying on § 2A1.1, the first-degree murder guideline, as the basis for his sentence on the arson conviction.

This contention is without merit. Section 2A1.1 applies to any death which "results from the commission of certain felonies." *See* U.S.S.G. §2A1.1, comment. (n.1). The application notes identify the federal felony murder statute, 18 U.S.C. §1111, as suggestive of which felonies are included. That statute defines first-degree murder as a killing "committed in the perpetration of, or attempt to perpetrate, any arson . . . ." 18 U.S.C. § 1111(a). Hence, since death resulted from arson,

the Guidelines authorize the sentencing court to apply the guideline for first-degree murder based upon that court's assessment of the facts surrounding the arson homicide. Contrary to defendant's suggestion, this discretion in imposing sentence does not create an impermissible ambiguity in the Guidelines requiring application of the rule of lenity. *Cf. United States v. Canales*, 91 F.3d 363, 367 (2d Cir. 1996) ("The rule of lenity requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply.").

Ferranti continues the challenge to his sentence by arguing that, even if §2A1.1 is applicable, the district court should have departed downward based on the facts of this case. Under § 2A1.1, a sentencing court is free to depart downward "if the defendant did not cause the death intentionally or knowingly." U.S.S.G. § 2A1.1, comment. (n.1). In the absence of an error of law or an erroneous belief on the part of the sentencing court that it had no power to depart, the district court's refusal to grant a downward departure and the extent of its departure are not appealable. *See United States v. Hendron*, 43 F.3d 24, 26 (2d Cir. 1994) (*per curiam*).

In light of this standard, defendant attacks the district court's failure to downwardly depart under §2A1.1 as an error of law on the ground that he did not "knowingly or intentionally" cause the firefighter's death. Yet, a plain reading of § 2A1.1's commentary refutes this claim. It says that "a downward departure may be warranted" if the defendant did not intend to cause death. U.S.S.G. § 2A1.1, comment. (n.1)

(emphasis added). The sentencing court was well aware of its discretionary power to depart under § 2A1.1, but chose not to do so after specifically identifying several aggravating factors, e.g., Ferranti's scheme to defraud an insurance carrier, his knowledge of tenants' presence in the building, the use of an accelerant, and his decision to set a building that was in part residential afire at night. In sum, we have no basis for reversing the district court's decision not to depart downwardly under § 2A1.1.

B. The Jury Directive Requirement

The district court did depart downwardly (from a life sentence), but it did so in order to avoid complying with 18 U.S.C. § 34's requirement that a jury approve of the life sentence mandated by § 2A1.1's base level offense of 43. The applicable version of § 34 provides:

> Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.

18 U.S.C.§ 34 (1988), *amended by* 18 U.S.C. § 34 (1994). The plain language of this section authorizes the imposition of a life sentence only by jury recommendation in the absence of a plea. Such a recommendation was never requested of the jury in this case.

Instead, the district court departed downward to base offense level 42, which provides for a term of imprisonment from 360 months to life under the appropriate criminal history category. In its calculation of Ferranti's sentence, the court determined that the 43-year old Ferranti's life expectancy was 31 years, or 372 months, from the time of sentencing. After considering the total amount of good-time credit to which he would be entitled, see 18 U.S.C. § 3624(b) (1994) (effective Nov. 1, 1987) (allowing 54 days of good-time credit per year), Judge Weinstein sentenced Ferranti to 435 months -- 5 years more than his life expectancy. With 64.3 months of good-time credit considered, Judge Weinstein determined that Ferranti's actual term of imprisonment would be 371 months from the time of his arrest, a period of time one month short of his life expectancy.

Appellant insists that his 435-month sentence violates § 34 because it exceeds his life expectancy, despite the fact that the sentence that he is likely to serve after receiving good-time credits is less than his life expectancy. The question before us is whether the maximum good-time credits should be deducted from a formal sentence in determining whether that sentence complies with §34. Ferranti's only argument against consideration of the good-time credits is that he is not yet entitled to them and therefore is not guaranteed release after a term of imprisonment less than his life expectancy.

While it is true that a defendant is not entitled to such credit, *see* 18 U.S.C. § 3624(b) (a prisoner "may receive" good-time credit subject to the Bureau of Prisons'

determination that he has displayed "exemplary compliance with such institutional disciplinary regulations"), we decline to adopt Ferranti's interpretation of § 34 that would, in effect, allow defendants to argue that they should receive a shorter formal sentence because they plan to disregard prison rules and thus fail to earn good-time credit. In holding that the district court does not violate § 34 when it considers maximum good-time credit in its calculation of a defendant's sentence, we join another circuit that has already done so. *See United States v. Gullett*, 75 F.3d 941, 951 (4th Cir.), *cert. denied*, 136 L. Ed. 2d 83, 117 S. Ct. 134 (1996); *see also United States v. Prevatte*, 66 F.3d 840, 848 (7th Cir. 1995) (Posner, C.J., concurring) ("I do think the maximum good-time credits should be subtracted. The defendant should not be allowed to say, 'My sentence is too long because I am planning to be a bad boy in prison and so won't earn the maximum good-time credits.'").

We also reject Ferranti's additional contention that, even considering the good-time credits, a 371-month term of imprisonment violates § 34 by falling uncomfortably close to his life expectancy. A sentence that is close to a person's life expectancy based on actuarial tables is not the functional equivalent of a sentence for the actual life of the person.

Although the jury directive requirement was eliminated in 1994, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title VI § 60003(a)(1), 108 Stat. 1968 (1994), the Ex Post Facto Clause precludes application of the 1994 amendment since Ferranti committed the arson in 1992 and, under the Ex Post Facto Clause, a retroactive change

in the definition of a crime or a retroactive increase in punishment for a criminal act is forbidden. *See Collins v. Youngblood*, 497 U.S. 37, 43, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

C. The Fine

The statutory fine of $ 2,911,599.58 for the arson homicide count is raised as an issue on the grounds that it is overly punitive and based upon improper considerations. The sentencing court departed upwardly from the Sentencing Guidelines' range of $ 25,000 to $ 250,000, see U.S.S.G § 5E1.2(c), and, relying on 18 U.S.C. § 3571(b)(2), imposed a statutory fine equal to twice the amount of the victims' losses.

Section 3571(b)(2) cross-references § 3571(d), which states that "if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of . . . twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." We review the district court's decision to depart upwardly under an abuse of discretion standard. See *United States v. Wilder*, 15 F.3d 1292, 1300 (5th Cir. 1994) (abuse of discretion standard applied to appellate review of enhanced fine imposed under § 3571(d)); *cf. United States v. Lavin*, 27 F.3d 40, 42 (2d Cir. 1994) (*per curiam*) (order of restitution reviewed for abuse of discretion).

Defendant's basic point is that the amount of the fine is grossly punitive in light of his financial resources. Under 18 U.S.C. § 3572(a), a sentencing court must consider a number of factors, some pertaining to defendant, some to other

concerns. Among those factors are: (1) the defendant's income, earning capacity and financial resources; (2) the burden the fine imposes on the defendant and his financial dependents; (3) pecuniary loss inflicted upon others; (4) whether restitution is ordered; (5) the expected costs of imprisonment; and (6) whether defendant can pass along the costs of the fine to consumers or other persons. There is no requirement that explicit findings be made concerning the defendant's ability to pay the fine, *cf. Lavin*, 27 F.3d at 42 (no explicit findings needed to support imposition of restitution order), and defendant bears the burden of establishing his inability to pay. *See United States v. Marquez*, 941 F.2d 60, 65-66 (2d Cir. 1991).

The record shows that the district court considered the mandatory factors, including Ferranti's known assets and the possible financial dependence of his son and former wife. It also considered defendant's failure to file tax returns over the past 10 years and his refusal to disclose financial information during pre-sentencing proceedings. From this evidence it inferred that appellant possessed considerably more assets than he admitted, and therefore that he had the financial resources to pay the large fine imposed. This inference was reasonable because defendant failed to establish his inability to pay. Moreover, we cannot allow a defendant's lack of disclosure at the sentencing phase of the criminal proceedings against him to work to his advantage on an appeal from that sentence.

Ferranti also maintains that the district court's consideration of allegations of appellant's other criminal

conduct was improper. Evidence of such conduct was offered at a pre-trial bail proceeding and noted in the pre-sentence report. However, the district court struck all references to such conduct from the report prior to sentencing. There is no evidence in the record from which we could conclude that, after striking the allegations, the district court impermissibly based imposition of the fine on that alleged criminal conduct. To the contrary, Judge Weinstein clarified that Ferranti's offense for which he was convicted and not his status as a slumlord or his unrelated violent conduct warranted the large fine.

In sum, the fine was reasonable and sufficiently supported by a record that fully demonstrates the exacerbated nature of the crime, the harm inflicted upon others, the defendant's ability to pay, and the lack of persons financially dependent upon defendant. See 18 U.S.C. § 3572(a) (setting forth factors that must be considered when imposing a fine).

CONCLUSION

Having considered all of Ferranti's challenges and finding no basis for reversal, the judgment of conviction with the sentence of conviction is accordingly affirmed.

18 USC § 844. Penalties

(a) Any person who violates any of subsections (a) through (i) ... shall be fined under this title, imprisoned for not more than 10 years, or both.

...

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

USSG §2A1.1. First Degree Murder

(a) Base Offense Level: 43.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 2113(e), 2118(c)(2); 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct.

However, the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed.

Background: [Deleted]

HISTORY: Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 82); November 1, 1990 (see Appendix C, amendment 310); November 1, 1993 (see Appendix C, amendment 476)

USSG §2A1.2. Second Degree Murder

(a) Base Offense Level: 33.

Commentary

Statutory Provision: 18 U.S.C. § 1111.

For additional statutory provision(s), see Appendix A (Statutory Index).

Background: The maximum term of imprisonment authorized by statute for second degree murder is life.

HISTORY: Historical Note: Effective November 1, 1987

USSG §2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level (Apply the Greatest):

(1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;

(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;

(3) 2 plus the offense level from § 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

(4) 2 plus the offense level from § 2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristic

(1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

3. "Explosives," as used in the title of this guideline, includes any explosive, explosive material, or destructive device.

HISTORY: Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 182, 184, and 185); November 1,